

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MMMT HOLDINGS CORPORATION,

Plaintiff,

v.

NSGI HOLDINGS, INC.,

Defendant.

Case No. C12-01570RSL

ORDER DENYING PLAINTIFF'S
MOTION TO FILE THIRD
AMENDED COMPLAINT
AND MOTION TO MODIFY
SCHEDULING ORDER

This matter comes before the Court on "Plaintiff's Motion to File Third Amended Complaint" (Dkt. # 112) ("Motion to Amend") and "Plaintiff's Motion to Modify Scheduling Order" (Dkt. # 116) ("Motion to Modify"). Defendant opposes both motions on the grounds that plaintiff has failed to demonstrate good cause under Fed. R. Civ. P. 16 and that justice does not require amendment under Fed. R. Civ. P. 15. Having reviewed the memoranda and exhibits submitted by the parties,¹ the Court finds as follows:

BACKGROUND

This lawsuit arises from plaintiff's sale of two flour mills to defendant for a fixed purchase price plus an additional amount referred to as the "Gross-up Amount" pursuant to the terms of a Partnership Interest and Membership Interest Purchase Agreement ("PIMIPA"). Dkt.

¹ These matters can be decided on the papers submitted. Plaintiff's requests for oral arguments are therefore DENIED.

1 # 26, Ex. A. The major point of contention between the parties is whether defendant fulfilled its
2 obligations to obtain and deliver an appraisal as required by the PIMIPA to determine the Gross-
3 Up Amount.

4 Plaintiff amended its original complaint as a matter of course pursuant to Fed. R. Civ. P.
5 15(a)(1). Defendant filed a motion to dismiss the amended complaint, which the Court granted in
6 part and denied in part. Dkt. # 48. The Court upheld plaintiff's breach of implied covenant claim
7 and dismissed plaintiff's breach of contract claims because plaintiff failed to plead the claims
8 with sufficient clarity and specificity. The Court invited plaintiff to move for leave to file an
9 amended complaint if plaintiff felt it could cure the deficiencies. Id. at 6-7.

10 Plaintiff then sought leave to amend its complaint under Rule 15(a)(2) with six additional
11 counts.² Dkt. # 51. The Court granted plaintiff's motion to file a second amended complaint
12 including all six of the proposed claims. Dkt. # 82. In so doing, the Court analyzed the five
13 factors courts consider when deciding whether to permit amendment under Rule 15 and
14 concluded that plaintiff's claims were not futile and that this early amendment at the Court's
15 invitation did not constitute bad faith, undue delay, or prejudice to defendant (particularly where
16 discovery had been stayed for a period of time).

17 Eight months later, plaintiff again seeks to amend its complaint and add additional parties.
18 The deadline for amending pleadings expired over nine months before plaintiff filed this motion
19 and the deadline to join parties passed fifteen months prior to plaintiff's motion. At this time,
20 discovery has closed. Plaintiff seeks to add four additional parties and five new claims to this
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23 ² Counts One, Two, Three and Five each alleged a breach of the PIMIPA based on an element of
24 Section 1.3(a) of the agreement and the definition of "Qualified Appraiser." Count Four set forth a new
25 claim for a declaration that the appraisal obtained and delivered by defendant is not binding on the
26 parties. Count Five specifically alleged that defendant was obligated and failed to obtain an appraisal
prepared in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"). In
Count Six, plaintiff reasserted its breach of implied covenant claim.

lawsuit. The proposed additional parties include two new plaintiffs³ who were selling shareholders and two new defendants⁴ who are defendant NSGI's Japanese parent companies. The proposed amended complaint states five new claims consisting of federal securities fraud, common-law fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, and punitive damages. Many of the claims are based on facts revealed in discovery. Plaintiff alleges that the "new" facts show that the proposed defendants obtained an earlier valuation from the entity appointed as Qualified Appraiser and defendants subsequently pressured that entity to reduce the valuation before submitting the appraisal to plaintiff.

DISCUSSION

A. Legal Standard

Federal Rules of Civil Procedure 15 and 16 govern amendments to pleadings. Although Rule 15(a) is based upon "a strong policy in favor of allowing amendment," Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994), Rule 15(a) does not control after a court has entered a pretrial scheduling order and the deadline for amendments of pleadings has passed. Precor Inc. v. Fitness Quest, Inc., No. C05-0993L, 2007 WL 136749 at *1 (Jan. 12, 2007). When a party seeks to amend a pleading after the date set forth in the scheduling order, that party "must first show good cause for amendment under Rule 16, then, if good cause be shown, the party must demonstrate that amendment was proper under Rule 15." Paz v. City of Aberdeen, 2013 WL 6163016 at *2 (W.D. Wash. Nov. 25, 2013) (citing Johnson v. Mammoth Recreation, Inc., 975 F.2d 604, 608 (9th Cir. 1992)).

Rule 16 requires "good cause" and "the judge's consent" in order to modify a scheduling order and allow amended pleadings after the deadline. The "good cause" standard focuses on the

³ John C. Miller and Michael L. Snow, individually and as Seller Representatives on behalf of the Selling Shareholders who were parties to the PIMIPA.

⁴ Nisshin Seifun Group Inc. and Nisshin Flour Milling Inc., collectively referred to as "Nisshin."

1 diligence of the party requesting the amendment. Johnson, 975 F.2d at 609. If a party has acted
2 diligently yet still cannot reasonably meet the scheduling deadlines, the court may allow
3 modification of the pretrial schedule. Id. However, “if that party was not diligent, the inquiry
4 should end” and the motion to modify should not be granted. Id.; see Millenkamp v. Davisco
5 Foods Intern., Inc., 448 Fed. Appx. 720, 721 (9th Cir. 2011); Zivkovic v. Southern California
6 Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002). Local Civil Rule 16(b) further provides that
7 the dates in the scheduling order are binding and “[m]ere failure to complete discovery within
8 the time allowed does not constitute good cause for an extension or continuance.” Rule 15(m)
9 states that “this rule will be strictly enforced” in order to “accomplish effective pretrial
10 procedures and avoid wasting the time of the parties, counsel, and the court.” While prejudice to
11 the party opposing the modification may provide additional reasons for denying the motion, it is
12 not required to deny a motion to amend under Rule 16(b). Coleman v. Quaker Oats Co., 232
13 F.3d 1271, 1295 (9th Cir. 2000).

14 **B. Third Motion to Amend**

15 Plaintiff asserts that the information giving rise to the additional claims and parties is
16 “based on the recent discovery of proposed defendants’ previously concealed fraudulent
17 conduct” and therefore the complaint could not have been amended prior to the July 2013
18 deadline. Motion to Amend (Dkt. # 112) at 2. Plaintiff asserts that good cause exists because
19 plaintiff took reasonable steps to conduct discovery and filed these motions soon after the facts
20 supporting the amended complaint came to light in the discovery process. Reply to Motion to
21 Modify (Dkt. # 126) at 1-2. Plaintiff also seeks to justify these belated motions by pointing to
22 “logistical difficulties” in the discovery process, including translation of documents from
23 Japanese to English and the burdensome Letter Rogatory process. Id. at 3.

24 The Court is not convinced that plaintiff exercised diligence throughout the many months
25 in which plaintiff had the opportunity to pursue additional parties and claims. Plaintiff has
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1 known of the existence of the proposed additional parties and that they were parties to the
2 transaction. In fact, plaintiff acknowledges that the current named plaintiff MMMT and named
3 defendant NSGI “were created after the PIMIPA was negotiated to facilitate the structure of the
4 transaction called for in the PIMIPA.” Motion to Amend (Dkt. # 112) at 10 (emphasis added).
5 Despite this knowledge, plaintiff failed to name the original parties who set up the transaction in
6 both its first and second amended complaints, and instead asks this Court to allow the addition of
7 four parties, all of whom were involved with the original transaction, nine months after the
8 deadline to amend pleadings had passed.

9 Many of plaintiff’s new claims involve allegedly concealed dealings between the current
10 defendant’s parent companies, Nisshin, and various firms under the umbrella “Ernst & Young”
11 (including Ernst & Young Transactional Advisory Services Co., Ltd. (“EYTAS”) and Ernst &
12 Young LLP (“EYUS”)), which advised Nisshin on the transaction. Ernst & Young was
13 ultimately appointed as the “Qualified Appraiser” for the transaction. Defendant provided
14 information to plaintiff early in discovery that signaled the relationship between Nisshin,
15 EYTAS, and E&Y in conducting the appraisal process. This information includes a written
16 agreement between Nisshin and EYTAS engaging E&Y to conduct the appraisal (shared with
17 plaintiffs in October 2012), the disclosure in November 2012 of two key witnesses and various
18 other representatives and employees from Nisshin and EYTAS, Ernst & Young’s valuation
19 analysis disclosed in 2012, and more. Opposition to Motion to Modify (Dkt. # 122) at 6.
20 Plaintiffs requested information relating to Nisshin and EYTAS from NSGI, but did not seek
21 discovery directly from those parties or assert any claims against them before the deadline to join
22 additional parties on December 27, 2012. After defendant had produced written discovery
23 revealing communications between Nisshin and EYTAS, plaintiff indicated that some Nisshin
24 and EYTAS employees were individuals with “discoverable information relating to Plaintiff’s
25 claims against Defendant,” yet still failed to join these parties or assert additional claims before
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1 the July 10, 2013 deadline to amend pleadings. Opposition to Motion to Modify (Dkt. # 122) at
2 7.

3 Plaintiff's two main justifications for the delay in seeking to add claims and parties are
4 unconvincing. First, plaintiff argues it could not have known that Nisshin had sought an earlier
5 valuation and "struck a deal with that appraiser" because "NSGI intentionally concealed [those
6 facts] from Plaintiff, saying it was 'none of their business.'" Reply to Motion to Modify (Dkt.
7 # 126) at 2. The evidence on which plaintiff relies does not support an inference that defendant
8 NSGI interfered with plaintiff's discovery of relevant information, or otherwise caused the delay
9 in filing this motion to amend. The declarant acknowledges that Nisshin did not tell the sellers
10 "prior to the time of the agreement that was signed in 2012" about the desktop appraisals E&Y
11 performed before the agreement was signed. Decl. of William Z. Pentelovitch (Dkt. # 113-21)
12 Ex. U at 3. Although this statement suggests that Nisshin failed to disclose certain facts leading
13 up to the transaction, it does not raise an inference that NSGI (an entity that did not even exist at
14 that point) purposefully concealed information from plaintiff during this lawsuit or somehow
15 interfered with plaintiff's ability to seek this information throughout the discovery process.
16 Plaintiff's argument that it could not have known of these facts any earlier in the discovery
17 process due to defendant's intentional concealment is unsupported.

18 Second, plaintiff claims that an extension is justified based on the burdensome discovery
19 process, including extensive document production and depositions, translation of documents
20 between Japanese and English, and the time-consuming Letter Rogatory process. However,
21 Local Rule 16(b)(4) makes clear that "[m]ere failure to complete discovery within the time
22 allowed does not constitute good cause for an extension or continuance." Here, the parties have
23 already agreed to a nine month extension of discovery. In negotiating this extension, the parties
24 took into account the need to translate a significant number of documents and the need to
25 conduct depositions overseas. See Joint Status Report (Dkt. # 87) at 1-2. Plaintiff has not
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1 demonstrated good cause for failing to complete discovery, especially when the burdens of
2 which it now complains were largely anticipated in advance.

3 In addition to plaintiff's lack of diligence, the prejudice that plaintiff's amended
4 complaint would cause defendant supports the denial of plaintiff's motions. Plaintiff claims that
5 prejudice to defendant is minimal because "the proposed amended claims arise from discovery
6 that has already taken place and the proposed new defendants are parent companies of NSGI and
7 have been closely involved in the issues in the current litigation." Motion to Amend (Dkt. # 112)
8 at 8. However, plaintiff's new allegations change the scope of the litigation, which would likely
9 require defendants to conduct additional discovery from parties and witnesses whom the parties
10 have already almost completed examining. See Opposition to Motion to Modify (Dkt. # 122) at
11 11-12. At this point, discovery would have to be reopened. Dkt. # 90. These additional burdens
12 constitute additional time, expenses, and resources at a late stage in the proceedings which
13 would prejudice defendant. See Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d
14 980, 986 (9th Cir. 1999) ("A need to reopen discovery and therefore delay the proceedings
15 supports a district court's finding of prejudice from a delayed motion to amend the complaint.").
16 Although prejudice is not required under a Rule 16(b) inquiry, a finding of prejudice "supplies
17 an additional reason to deny the motion." Coleman, 232 F.3d at 1295.

18 For the foregoing reasons, plaintiff has failed to demonstrate good cause under Rule
19 16(b). Because plaintiff cannot satisfy Rule 16(b), it is not necessary to evaluate plaintiff's
20 Motion to Amend under Rule 15. See Johnson, 975 F.2d at 609 ("If [the party seeking to amend]
21 was not diligent, the inquiry should end."). Therefore, plaintiff's Motion to File Third Amended
22 Complaint (Dkt. # 112) is DENIED.

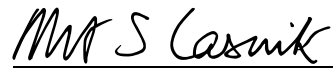
1 **C. Motion to Modify the Scheduling Order**

2 A party seeking modification of a pretrial scheduling order must show “good cause”
3 under Rule 16(b)(4). As discussed in the denial of plaintiff’s Motion to Amend, plaintiff has
4 failed to exercise diligence and demonstrate good cause under Rule 16(b). Therefore, plaintiff’s
5 Motion to Modify Scheduling Order (Dkt. # 116) is DENIED.

6 **CONCLUSION**

7 For all of the foregoing reasons, plaintiff’s Motion to File Third Amended Complaint
8 (Dkt. # 112) and Motion to Modify Scheduling Order (Dkt. # 116) are DENIED.

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10 Dated this 9th day of June, 2014.

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13 Robert S. Lasnik
14 United States District Judge
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